

conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such

action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

**CONCISE STATEMENT OF THE CASE PER  
SUPREME COURT RULE 14.1(g)**

**INTRODUCTION**

This petition for certiorari brings to the Supreme Court an issue on which the Sixth Circuit has imposed a limiting construction on the federal Privacy Act, refusing to either acknowledge or even attempt to distinguish the contrary decision of the Eleventh Circuit in *Schwier v Cox*, 340 F.3d 1284 (11<sup>th</sup> Cir. 2003) (Pet. Apx. 31a, Appendix E). The result is that federally assigned and protected social security numbers now have no protection from disclosure and misuse by state or local governments, or by any private actors, in Michigan, Ohio, Tennessee or Kentucky.

**FACTUAL AND PROCEDURAL BACKGROUND**

Petitioner respectfully petitions for certiorari to review the January 14, 2005 decision of the Sixth Circuit published as *Schmitt v. City of Detroit*, 395 F.3d 327 (6<sup>th</sup> Cir., 2005)(Pet. Apx. A, pp. 1a-9a), on grounds that the decision is clearly erroneous, conflicts with the holdings in other circuits<sup>2</sup>, and involves construction of a statute of substantial

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<sup>2</sup> And even conflicts with other subsequent decisions, at least as to the federal right of privacy, within the Sixth Circuit itself, e.g., *Barber v*

importance to our nation's jurisprudence as well as to the quintessentially American interest in protecting information of a private nature, improper dissemination of which exposes the victim to identity fraud and other malefactions.

The facts and issues are pithily summarized in the Sixth Circuit's decision as follows:

Plaintiff Daniel Schmitt received a mailing from the City of Detroit concerning his 2001 income tax obligation. The vendor hired by the City to print these mailings included the recipient's social security number on the envelope. Plaintiff filed suit against the City under § 7(b) of Privacy Act of 1974 ("the Privacy Act"), Pub.L. 93-579, 88 Stat. 1896, on behalf of himself and other similarly situated individuals. [FN1] After the City agreed to include disclosure notices in future requests for social security numbers, the district court granted declaratory relief under the Privacy Act and dismissed all remaining claims pursuant to Fed.R.Civ.P. 12(b)(6). On appeal, plaintiff contends that he is entitled to money damages, attorney's fees, and costs. Because we hold that the Privacy Act applies solely to federal agencies, plaintiff failed to state a federal claim and, as a consequence, his complaint should have been dismissed *in toto*.

As do the federal government and the State of Michigan, the City relies on a person's social security number for tax identification purposes, as permitted by the Internal Revenue Code, 26 U.S.C. § 6109(d)

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*Overton*, 2005 Westlaw 2018134 (WD Mich. August 20, 2005), slip op. p. 3 ("Plaintiffs have suffered a significant degree of harm from the release of their private personal information to the prisoner population of the Ionia Maximum Security Correctional Facility.") (copy provided in Pet. Apx. 56a, Appendix F, at p. 58a).

("The social security account number issued to an individual for purposes of section 205(c)(2)(A) of the Social Security Act shall, except as shall otherwise be specified under regulations of the Secretary, be used as the identifying number for such individual for purposes of this title."). In 2001, the City contracted with T.W. Graphics to print, address, pre-sort, and deliver income tax forms for mailing. The mailing label included the taxpayer's social security number. When this mistake came to light, Mayor Kwame Kilpatrick wrote a letter of apology to the aggrieved taxpayers, promising to "take the necessary steps to prevent such an unwelcome event in the future." Plaintiff's initial complaint was filed on November 26, 2002, ten months after the mayor's apology. The complaint was amended the following January. Section 7(b) of the Privacy Act, which is the claim at the heart of this appeal, provides as follows:

Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

Pub.L. 93-579, 88 Stat.1909, 5 U.S.C. § 552a (2004) (note).

Throughout this litigation, plaintiff has relied upon this provision for the proposition that local governmental entities, such as the income tax division of the City, are subject to the Privacy Act.

The Sixth Circuit went on to hold that the City of Detroit, not being an agency of the federal government, is simply outside the ambit of the Privacy Act, and thus no remedy for non-federal Privacy Act violations exists, either in equity or at law under 5 U.S.C. §552a(g)(1)(D)(4)(A) (which by its terms applies only to violations of §3 of the Privacy Act, not §7(b)). In so ruling, the Sixth Circuit ignored the unambiguous text of §7(b) of the Privacy Act, which expressly imposes an affirmative obligation on any "Federal, State, or local government agency" which requests an individual's social security number ("SSN") to inform the individual whether such disclosure is voluntary or mandatory, by what statutory authority such number is solicited, and the uses that will be made of it.

Plaintiff timely moved for rehearing and rehearing *en banc* of the Sixth Circuit's decision pursuant to FRAP 35(b)(1)(B) and 40 and 6 Cir. R. 35(a), noting that the Sixth Circuit's decision was in direct conflict with *Schwier v Cox*, 340 F.3d 1284 (11<sup>th</sup> Cir. 2003). Some seven months later, rehearing was denied on August 18, 2005 without explanation for the unusual delay, and the mandate then issued on August 25, 2005.

#### REASONS FOR GRANTING THE PETITION

The issue presented—whether despite the fact that §7(b) of the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 1909, 5 U.S.C. §552a (2004)(note) expressly imposes an affirmative obligation on any "Federal, State, or local government agency" which requests an individual's social security number ("SSN") to inform the individual whether such disclosure is voluntary or mandatory, by what statutory authority such number is solicited, and the uses that will be made of it, it nonetheless has no application to either State or local government agencies because "agency" is generally defined by 5 U.S.C. §§552a(a)(1) and 552(f) as

encompassing only federal agencies *with respect to other provisions of the Privacy Act* – is of exceptional importance to the fulfillment of Congress' purpose to protect the privacy of individuals.

Moreover, the Sixth Circuit's decision conflicts with a decision of the Eleventh Circuit, *Schwier v Cox*, 340 F.3d 1284 (11<sup>th</sup> Cir. 2003), which was neither cited nor distinguished by the Sixth Circuit. Unless the Supreme Court reviews the issue by certiorari, the federal right to privacy will be protected in Alabama, Florida and Georgia but not in Michigan, Ohio, Tennessee and Kentucky. Not only will this invidiously discriminate in the application of a federal statute based on geographical happenstance, as people in our mobile society relocate from one State to another, but the American people may find their right of privacy under federal law, or the right of privacy of people with whom they deal, unexpectedly diminished or enhanced based on a change of residency. This will unduly complicate the efforts of employers, employees, businesses, customers, State and local governments, and others to either comply with federal law or to vindicate their federal rights.

#### **JURISDICTION OF THE DISTRICT COURT PER SUPREME COURT RULE 14.1(g)(ii)**

The jurisdiction of the District Court was predicated on 28 U.S.C. §1331 and 88 Stat. 1896 (§7(b) of the Privacy Act).

#### **Issue**

Where §7(b) of the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, 1909, 5 U.S.C. §552a (2004)(note) expressly imposes an affirmative obligation on any “Federal, State, or local government agency” which requests an individual’s social security number (“SSN”) to inform the individual whether such disclosure is voluntary or mandatory, by what

statutory authority such number is solicited, and the uses that will be made of it, the Sixth Circuit erred in holding, contrary to the Eleventh Circuit (and without citing or distinguishing the Eleventh Circuit's decision), that §7(b) has no application to either State or local government agencies on the basis that "agency" is generally defined in 5 U.S.C. §552(f) as encompassing only federal agencies.

**DIRECT AND CONCISE ARGUMENT PER  
SUPREME COURT RULE 14.1(h)**

Proclaiming an inability to reconcile the supposed conflict between the plain language of §7(b) and the statutory definition of "agency", the Sixth Circuit engaged in a selective review of legislative history to declare, in effect, that Congress framed §7(b) as enacted as a result of a hypothesized oversight. The Sixth Circuit thus rewrote §7(b) to judicially eliminate the words "State or local government" from §7(b) and likewise rewrite 5 U.S.C. §552a(a)(1) to delete the limiting phrase "as used in this section".

Of course, the simple answer is that the Sixth Circuit misread the plain text of 5 U.S.C. §552a(a)(1), as incorporating the definition of "agency" in 5 U.S.C. §552(f) into §7(b) of the privacy act. The Sixth Circuit's fundamental error was in failing to adhere to the text of §552a(a)(1), which limits the incorporation of the definition from §552(f) to "this section." Section 7(b) is not part of §552a(a)(1); therefore, the definition in §552(f) is not applicable to §7(b) of the Privacy Act.

The Sixth Circuit's error becomes manifest as a matter of common sense. The language of §7(b) by its terms expressly extends to "State or local government agencies"; it would have been illogical and self-contradictory for Congress to pass a law applying by its terms to "State or local government agencies" but to define "agency" as

applying only to federal agencies. Congress was not so inept; by not codifying §7(b) as part of 5 U.S.C. §552a and limiting adoption of the definition from §552(f) to "this section" (meaning §552a), it carefully avoided importing such a contradictory definition of "agency". The Sixth Circuit tortured misreading thus imports doubt into a Congressional enactment that, on its face, is clear and unambiguous.

Prior to the Sixth Circuit's decision, there was a split between the district judges in the Sixth Circuit. *Greater Cleveland Welfare Rights Org v Bauer*, 462 F. Supp. 1313, 1319 n. 3 (N.D. Ohio, 1978) held that §7(b) applies post-1976 to local government agencies, whereas in the present case the District Court for the Eastern District of Michigan found that §7(b) does not apply to municipalities, although it did award declaratory relief. *Schmitt v City of Detroit*, 267 F Supp 2d 718 (E.D. Mich., 2003). The Sixth Circuit's decision finds that §7(b) has no application to State or local government agencies despite its specific language, and thus that there is no remedy whatever under federal law for a violation of §7 of the Privacy Act by a non-federal agency.

In order to reach this startling conclusion, and to thus take the unprecedented step of usurping the prerogatives of the Legislative branch (in which the Executive plays an important role by virtue of the veto power) to judicially rewrite a statute—not to conform it to constitutional limitations, but to solve a supposed inconsistency between two statutory provisions—the Sixth Circuit propounded a number of intermediate assertions which are clearly erroneous.

First, the Sixth Circuit incorrectly claimed that "other courts have likewise concluded that the [Privacy] Act applies only to federal agencies. See *Polchowski v Gorris*, 714 F.2d 749, 752 (7<sup>th</sup> Cir. 1983) \* \* \*; *Stoianoff v Comm'r of Motor*

*Vehicles*, 107 F. Supp. 2d 439, 442 (S.D.N.Y. 2000) \* \* \*. Precisely these contentions were rejected by the Eleventh Circuit in *Schwier v Cox*, 340 F.3d 1284 (11<sup>th</sup> Cir. 2003) (Pet. Apx. 31a, Appendix E), a decision completely overlooked by the Sixth Circuit. *Schwier* holds that §7(b) of the Privacy Act does create federal rights enforceable against State and local government agencies under 42 U.S.C. §1983, despite the fact that the defendant was a State official sued in his official capacity—and State agencies are ordinarily beyond the reach of §1983's recognition of a remedy in damages, *Will v Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L Ed 2d 45 (1989)—whereas the present case is a suit against a city and its officials, who are potentially liable under 42 U.S.C. §1983 for both injunctive and monetary relief, *Monell v New York City Dep't of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Eleventh Amendment having no application to municipalities. *Schwier* opined as follows (full text in Pet. Apx. 31a, Appendix E):

*A. Whether the district court erred in holding that section 7 of the Privacy Act does not allow for enforcement by a private right of action against state agencies by a suit under § 1983.*

The Privacy Act of 1974 contains only two substantive sections, section 3 and section 7. See 88 Stat. at 2177-94. Section 3 of the Privacy Act applies only to federal agencies and, among other things, delineates an individual's right to records of federal agencies and right to be protected from disclosure of records by federal agencies. Section 3 contains a comprehensive remedial scheme which includes the right to bring a civil action against a federal agency; however, the remedial scheme of section 3 states that it applies only to section 3.

Section 7 of the Privacy Act bars federal, state, or local agencies from denying "any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number" to the agency. [FN3] Section 7 of the Privacy Act does not contain its own remedial scheme and is explicitly excluded from the remedial scheme of section 3; thus, section 7 has *no* remedial scheme.

FN3. The entire text of section 7 of the Privacy Act states:

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(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

88 Stat. at 2194.

1. *The district court's finding that section 7 of the Privacy Act is a "dead letter."*

Within the Privacy Act itself, Congress stated that section 3 was an amendment to Title V, which governs federal administrative agencies. See 88 Stat. at 2178. Thus, section 3 added a new section to Title V and was codified as 5 U.S.C. § 552a. *Id.* at 2177. Because Congress made no such statement about section 7 of the Privacy Act, the revisor of the U.S. Code placed section 7 in an "Historical and

"Statutory" note following 5 U.S.C. § 552a. See 5 U.S.C. § 552a (note). The district court mistakenly placed great weight on this fact. The district court noted that, although section 7 was part-of the Privacy Act that "was passed into law as Public Law 93-579," the fact that section 7 "was never codified, and appears only in the 'Historical and Statutory Notes' section of the United States Code," made section 7 a mere "historical footnote to the Privacy Act of 1974 [which] Congress has never reflected any intention of [codifying]." The district court apparently believed that public laws have less "weight" as laws than laws which have been codified. The reverse is true: "the Code cannot prevail over the Statutes at Large when the two are inconsistent." *United States v. Welden*, 377 U.S. 95, 98 n. 4, 84 S.Ct. 1082, 1085 n. 4, 12 L.Ed.2d 152 (1964) (internal quotations omitted).

The district court also stated that section 7 was deleted from the Privacy Act by the Senate Government Operations Committee "before the law was codified into the official code." The district court quotes Senate Report 1183, but the quote demonstrates that the provision that was deleted from the Act pertained only to a business entity's refusal to enter into a "business transaction or commercial relationship with an individual because of [his] refusal to disclose or furnish [his social security] number." S. Rep. No. 93-1183 (1974), reprinted in 1974 U.S.C.C.A.N. 6916, 6943. Thus, the court's conclusion that section 7 of the Privacy Act had been deleted was error. The best proof of this is section 7's presence in the Statutes at Large. See 88 Stat. at 2194; see also *Welden*, 377 U.S. at 98 n. 4, 84 S.Ct. at 1085 n. 4. We therefore conclude that the district court erred in finding that section 7 of the Privacy Act was "a dead letter."

2. *The district court's finding that the remedial scheme of section 3 forecloses a private action for violations of section 7.*

In finding that section 7 does not provide for a private right of action, the district court relied on the Ninth Circuit's holding in *Dittman v. California*, 191 F.3d 1020 (9th Cir.1999), that " '[t]he civil remedy provisions of the statute do not apply against private individuals, state agencies, private entities, or state and local officials.' " 191 F.3d at 1026 (quoting *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1447 (9th Cir.1985) (first emphasis added)).

In *Dittman*, the Ninth Circuit relied on two cases which involved only section 3 of the Privacy Act. Thus, when the Ninth Circuit quoted *Unt v. Aerospace Corp.* above, the phrase, "the statute," referred to section 3 of the Privacy Act, *not* section 7. *Unt*'s holding had no relevance to the facts of *Dittman* or to the present case because in *Unt*, the plaintiff was trying to sue a non-government entity for violations of section 3 of the Privacy Act, which pertains only to federal agencies. *Unt*, 765 F.2d at 1447.

In addition, *Dittman* relied on the Seventh Circuit's holding in *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir.1983). *Polchowski* also had no relevance to the facts of *Dittman* because, again, *Polchowski* involved enforcement of section 3 of the Privacy Act, rather than section 7. In *Polchowski*, the plaintiff sought to sue a state agency under § 1983 for releasing criminal information about him. 714 F.2d at 750. The release of the information would have violated section 3 of the Privacy Act, but section 3 applies only to federal agencies. Thus, the court reasoned, "Congress, by limiting the scope [of section 3 to federal agencies]

has provided unequivocal and persuasive evidence that it intended to foreclose private enforcement of [section 3] against state or local officials who make unwarranted disclosures of statistical information." *Id.* at 752 (internal quotations omitted). In other words, the rights created by section 3 of the Privacy Act do not restrict the activities of *state* agencies.

In *St. Michael's Convalescent Hospital. v. California*, 643 F.2d .369, 1373 (9th Cir.1981), on which *Dittman* also relied, the plaintiffs sought to sue a state agency under section 3 of the Privacy Act. As in *Polchowski*, the plaintiffs sought to sue a *state* agency for violating a section of the Privacy Act which applies only to *federal* agencies. Thus, the Ninth Circuit dismissed plaintiffs' claims. *St. Michael's*, 643 F.2d at 1372.

In summary, *Unt*, *Polchowski*, and *St. Michael's*, all relied upon by the Ninth Circuit in *Dittman*, were distinguishable from *Dittman* and did not support the Ninth Circuit's holding in that case. *Dittman* failed to recognize that the remedial scheme of section 3 applies only to section 3 and has no bearing on section 7. Thus, the remedial scheme of section 3 provides no basis for concluding that Congress intended to preclude private remedies under § 1983 for violations of section 7. Therefore, we conclude that the district court erred in finding that the remedial scheme of section 3 of the Privacy Act precluded a private right of action via § 1983 for violations of section 7 of the Privacy Act.

### 3. *The district court's finding that the Tax Reform Act of 1976 limited the scope of the Privacy Act.*

The district court also found that the Tax Reform Act of 1976, which amended the Social Security Act, authorized the states to use ssns for voting. The

court's finding was due in large part to its reliance on *Stoianoff v. Commissioner of Motor Vehicles*, 107 F.Supp.2d 439, 442 (S.D.N.Y.2000), *aff'd*, 12 Fed.Appx. 33 (2nd Cir.2001). However, *Stoianoff* and the district court mistakenly relied on Committee language which was much broader than the very narrow language of the final version of the Tax Reform Act passed into law. See *Stoianoff*, 107 F.Supp.2d at 442. The final version authorizes States to use ssns only "in the administration of any tax, general public assistance, driver's license, or motor vehicle registration." 42 U.S.C. § 405(c)(2)(C)(i) (2003). Thus, the district court erred in concluding that the scope of the Privacy Act had been limited by the Tax Reform Act.

#### 4. *The Privacy Act and §1983.*

In *Gonzaga University v. Doe*, 536 U.S. 273, 283-84, 122 S.Ct. 2268, 2276, 153 L.Ed.2d 309 (2002), the Supreme Court noted that the inquiry into whether a statute contains an implied right of action and the inquiry into whether the statute creates rights enforceable under § 1983 "overlap" in that both inquiries must begin with the question of whether "Congress intended to create a federal right." 536 U.S. at 283, 122 S.Ct. at 2275. Here, we ask only whether the Privacy Act creates rights enforceable under § 1983 because this is the issue Appellants raise on appeal.

Section 1983 provides a private right of action whenever an individual has been deprived of any constitutional or statutory federal right under color of state law. See 42 U.S.C. § 1983; see also *Maine v. Thiboutot*, 448 U.S. 1, 4, 100 S.Ct. 2502, 2504, 65 L.Ed.2d 555 (1980). In *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997), the

Supreme Court noted that they had "traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right":

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. at 340-41, 117 S.Ct. at 1359 (internal citations and quotations omitted). [FN4] However, in *Gonzaga*, the Court pointed out that some courts had misunderstood the first factor of *Blessing* to permit a conferred "benefit" rather than "anything short of an unambiguously conferred right to support a cause of action brought under § 1983[,] ... [which] provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." 536 U.S. at 282-83, 122 S.Ct. at 2275 (emphasis added).

FN4. In *Blessing*, the Supreme Court found that Title IV-D could not be enforced by individuals under § 1983. The Court noted that Title IV-D's "requirement that a State operate its child support program in 'substantial compliance' with Title IV-D" was a "yardstick for the Secretary to measure the

*systemwide performance of a State's Title IV-D program*" and thus did not confer a right or "*individual entitlement to services*" on "*individual children and custodial parents.*" 520 U.S. at 343, 117 S.Ct. at 1361.

Thus, before we analyze the application of the *Blessing* factors to the Privacy Act, in keeping with *Gonzaga*, we must first ask whether Congress created an "unambiguously conferred right" in section 7 of the Privacy Act. 536 U.S. at 283, 122 S.Ct. at 2275; *see also Blessing*, 520 U.S. at 340, 117 S.Ct. at 1359 ("In order to seek redress through § 1983, ... a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*"). The relevant portion of section 7 states, "It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." 88 Stat. at 2194. We agree with the Government that this language, aimed at the denial of rights to individuals, is analogous to language cited by the Supreme Court in *Gonzaga* as "explicit 'right-or duty-creating language'".

Title VI provides:

"*No person in the United States shall ... be subjected to discrimination under any program or activity receiving Federal financial assistance*" on the basis of race, color, or national origin. 78 Stat. 252, 42 U.S.C. § 2000d (1994 ed.) (emphasis added).

Title IX provides:

- "*No person in the United States shall, on the basis of sex ... be subjected to discrimination*

under any education program or activity receiving Federal financial assistance."

86 Stat. 373, 20 U.S.C. § 1681(a) (emphasis added). Where a statute does not include this sort of explicit "right- or duty-creating language" we rarely impute to Congress an intent to create a private right of action. 536 U.S. at 284 n. 3, 122 S.Ct. at 2276 n. 3. In contrast, the relevant language of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which the *Gonzaga* Court held not to create personal rights enforceable under § 1983 provides:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization.

536 U.S. at 278-79, 122 S.Ct. at 2273 (quoting 20 U.S.C. § 1232g(b)(1)). The Court explained:

Unlike the individually focused terminology of Titles VI and IX ("no person shall be subjected to discrimination"), FERPA's provisions speak only to the Secretary of Education, directing that "[n]o funds shall be made available" to any "educational agency or institution" which has a prohibited "policy or practice." 20 U.S.C. § 1232g(b)(1). This focus is two steps removed from the interests of individual students and parents and clearly does not confer the sort of "*individual entitlement*" that is enforceable under § 1983.

*Id.*, 536 U.S. at 287, 122 S.Ct. at 2277 (quoting *Blessing*, 520 U.S. at 343, 117 S.Ct. at 1353).

Admittedly, the language of section 7 falls somewhere in between the language of Titles VI and IX and that of FERPA. The subject of the relevant clauses of Titles VI and IX is "person," whereas the subject of the relevant clause of the Privacy Act is "it." In other words, if the Privacy Act were worded, "No individual may be denied any right, benefit, or privilege provided by law by any Federal, State or local government agency because of such individual's refusal to disclose his social security account number," the language would be more precisely analogous to that of Titles VI and IX. Nonetheless, the Privacy Act clearly confers a *legal right* on *individuals*: the right to refuse to disclose his or her ssn without suffering the loss "of any right, benefit, or privilege provided by law." 88 Stat. at 2194. Thus, we conclude that Congress created an "unambiguously conferred right" in section 7 of the Privacy Act. *Gonzaga*, 536 U.S. at 283, 122 S.Ct. at 2275. [FN5]

FN5. In addition, unlike the Privacy Act, the *Gonzaga* court held that FERPA is essentially "spending legislation," which rarely "confer[s] enforceable rights." *Gonzaga*, 536 U.S. at 279, 122 S.Ct. at 2273.

As for the factors of *Blessing*, the language of section 7 is clearly intended to benefit individuals, as discussed above; is specific rather than amorphous; and is clearly mandatory. To read the statute is to see that it easily meets the three criteria of *Blessing*. First, because we have already concluded that Congress created an "unambiguously conferred right" in

section 7 of the Privacy Act, we necessarily conclude that the language is intended to benefit individuals. Secondly, the prohibitions of the statute are clear and specific: no "Federal, State or local government agency [may] deny ... any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number." 88 Stat. at 2194. Finally, the language, "It shall be unlawful" is mandatory rather than precatory. These words indicate a clear prohibition of specific behavior by Federal, State or local government rather than an "aspirational" goal or "yardstick." *See Blessing*, 520 U.S. at 343, 117 S.Ct. at 1361.

However, "[e]ven if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983." *Blessing*, 520 U.S. at 341, 117 S.Ct. at 1360. To establish that the presumption cannot be rebutted, courts must look to whether Congress intended to "foreclose[ ] a remedy under § 1983" either "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.*

As the text demonstrates, Congress did not explicitly foreclose an action under § 1983. Thus, the relevant question is whether Congress did so "impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement." *Id.* Again, to read the statute is to answer the question. Section 7 contains no enforcement scheme at all. And, as we have explained above, although section 3 of the Privacy

Act contains a comprehensive remedial scheme, section 3 specifically states that its remedial scheme applies *only* to section 3. Thus, the presumption that the rights conferred by section 7 of the Privacy Act may be vindicated via a suit under § 1983 stands, and we hold that the rights conferred by section 7 may be enforced under § 1983.

B. *If the Privacy Act allows for a private right of action, whether Congress exceeded its authority in enacting the Privacy Act, rendering the Privacy Act unconstitutional.*

Cox argues that if Appellants may sue a State for violation of the Privacy Act via § 1983, then Congress exceeded its authority in passing the Privacy Act. Cox argues that the only possible source of authority for the Privacy Act was Congress's Commerce Clause power. The Government argues, however, that Congress's right to establish the use of ssns arises from the "general welfare clause," which authorizes Congress to spend money for the general welfare. This power is "quite expansive." *Buckley v. Valeo*, 424 U.S. 1, 90, 96 S.Ct. 612, 668, 46 L.Ed.2d 659 (1976). In addition, the Government argues, the Necessary and Proper Clause "authorizes Congress ... to adopt measures that bear a rational connection to any of its enumerated powers." *United States v. Edgar*, 304 F.3d 1320, 1326 (11th Cir.), cert. denied, 537 U.S. 1078, 123 S.Ct. 679, 154 L.Ed.2d 577 (2002). Thus, the Government argues, because Congress had the authority to authorize the creation of ssns, Congress has the authority to "safeguard[ ] the proper use of social security numbers by prohibiting federal, state, and local governments from conditioning an individual's legal rights on disclosure of his social security number." We agree with the Government

and hold that Congress did not exceed its authority in passing the Privacy Act.

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## V. CONCLUSION

### A. *Privacy Act Claims*

In summary, we hold that the rights conferred by the Privacy Act may be vindicated by a private suit under § 1983. We also hold that Congress did not exceed its authority in enacting the Privacy Act.

340 F.3d 1287-1294.

The Sixth Circuit opinion goes even further astray in finding any inconsistency between the definition of "agency" in 5 U.S.C. §§552(f) and §7(b) of the Privacy Act, which by its terms plainly supersedes any such limiting definition by specifying, in clear and unambiguous terms, that it applies to "any Federal, State, or local government agency". Granting that a mere reference to "agency", standing alone, would extend only to federal agencies, Congress could hardly have been more pellucid in bypassing that definitional restriction by including the three unmistakable modifiers "Federal", "State", and "local". The Sixth Circuit thus contravened a cardinal rule of statutory construction by adopting a reading that renders all three modifiers not merely superfluous—which would be error of itself, *Mertens v. Hewitt Associates*, 508 U.S. 248, 258, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) ("We will not read the statute to render the modifier superfluous")—but which proceeds to remove those terms from the statute by judicial fiat, in violation of every constitutional principle of separation of powers. Where at all possible, courts are obligated to give every word of a statute some operative effect. *Cooper*

*Industries, Inc v Aviall Services, Inc*, 543 U.S. 157, 125 S. Ct. 577, 584, 160 L. Ed. 2d 548 (2004), citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 35-36, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992). The Sixth Circuit opinion does not even mention these controlling principles.

The Sixth Circuit decision also violates the rule of *noscitur a sociis*, that a word is known by the company it keeps, and in construing a statute, one word cannot be read so as to deprive surrounding words of any substantive significance. *Gustafson v Alloyd Co, Inc*, 513 U.S. 561, 575, 115 S. Ct. 1061, 1070, 131 L. Ed. 2d 1 (1995).

Further, the Sixth Circuit seems to have assumed that once a word is defined by Congress, Congress itself cannot avoid the limitations inherent in that definition by employing words of modification. Once "agency" is defined as limited to federal government agencies, the Sixth Circuit—in violation of the accepted rules of English grammar and syntax—requires that any further descriptive appended words be regarded as surplusage. Congressional reference, however explicit, to "any Federal, State, or local government agency" in §7(b) of the Privacy Act must, in the Sixth Circuit's view, be read to say "any agency", because "agency" is defined in 5 U.S.C. §552(f) as referring only to "federal agencies". Thus, if Congress were to enact a tribute to Babe Ruth, and included therein a definitional section stating that "As used herein, "Ruth" means "George Herman 'Babe' Ruth", but then provided in the operative portion of the legislation that a pension be provided to "Babe Ruth and his wife Helen Ruth during their lifetimes", the Sixth Circuit would find that the pension was payable only to Mr. Ruth during his lifetime, because "Ruth" must be read to refer only to Babe Ruth, and thus cannot be understood to extend to his wife, despite the express statutory language. Such a method of statutory construction not only defies the rules of English, but contravenes the bounds of logic; a

limiting definition applies unless the context of a statute using the defined term precludes such a reading. When words of modification are included in a statute in association with a defined term, the words of modification must be given their sway, because every word of a statute must be treated as relevant and material. Here, of course, the limiting definition of "agency" in 5 U.S.C. §552a(a)(1) applies only to §3 of the Privacy Act, 5 U.S.C. 552(f) ("As used in this section . . ."), and not to §7(b).

Moreover, a statutory term may have different meanings even as between succeeding subparagraphs of a single enactment. Thus, in *Nat'l Organization for Women v. Scheidler*, 510 U. S. 249, 258 ff, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994), the Supreme Court construed "enterprise" as importing an element of economic motivation when used in 18 U.S.C. §1962(a) and (b), but not for purposes of §1962(c).

Indeed, in *Scheidler* this Honorable Supreme Court was critical of lower court constructions based on legislative findings:

"We also think that the quoted statement of congressional findings is a rather thin reed upon which to base a requirement of economic motive neither expressed nor, we think, fairly implied in the operative sections of the Act."

If even Congressional findings, incorporated into the actual enactment, fail to warrant adopting a construction that deviates from the plain text of the operative sections, *a fortiori* the Sixth Circuit decision's reliance here on selective statements from S. Rep. 93-1183, reprinted in 1974 U.S.C.C.A.N.6916, 6932-6933, reflects a flouting of Congress' intent as expressed in the actual language of §7(b). Note that in *Schwier, supra*, 340 F.3d at 1288-1289, the Eleventh Circuit

quoted other pages of the very same S. Rep. 93-1183, 1974 U.S.C.C.A.N.6916, 6943:

The district court quotes Senate Report 1183, but the quote demonstrates that the provision that was deleted from the Act pertained only to a business entity's refusal to enter into a "business transaction or commercial relationship with an individual because of [his] refusal to disclose or furnish [his social security] number." S. Rep. No. 93-1183 (1974), reprinted in 1974 U.S.C.C.A.N. 6916, 6943. Thus, the court's conclusion that section 7 of the Privacy Act had been deleted was error.

The Sixth Circuit's decision thus elevates a misunderstanding of the quoted portions of the Senate Report (which, even as quoted by the Sixth Circuit, speaks of "State, local and private data banks", saying nothing about "State and local government agencies") into an excuse to judicially revise the statute by striking therefrom the language Congress chose to include and which the President accepted.

Because of the manifest errors that permeate the Sixth Circuit's decision, and the resulting conflict with the Eleventh Circuit's *Schwier* decision—neither cited nor distinguished by the Sixth Circuit—certiorari should be granted, the decision of the Sixth Circuit should be rejected, the declaratory relief granted by the district court affirmed, and the cause remanded to the district court for the purpose of awarding damages under 42 U.S.C. §1983, and attorney fees pursuant to 42 U.S.C. .

## CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that his petition for certiorari be granted, or alternatively that pursuant to Supreme Court Rule 16.1 that the Court summarily reverse the lower court orders in this cause and direct that the cause be remanded to the United States District Court for the Western District of Michigan, with instructions to continue the injunctive relief previously granted by that court and for further proceedings on petitioner's claim for monetary damages, based on 42 U.S.C. §1983, and for attorney fees under 42 U.S.C. §1988.

Respectfully submitted

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Supreme Court U.S.  
C. 11-2

2 05-55406T 13 2005

No. \_\_\_\_\_

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*On the  
Supreme Court of the United States*

DANIEL A. SCHMITT,  
*Petitioner*

v.

CITY OF DETROIT, LORETTA NEAL, MARK VANN, JAMES  
FLORKOWSKI, BRYANT JENKINS, AND T. W. GRAPHICS,  
*Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

**APPENDIX IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

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## **APPENDIX A**

**United States Court of Appeals,  
Sixth Circuit.**

**Daniel A. SCHMITT, Plaintiff-Appellant,  
v.**

**THE CITY OF DETROIT, a Michigan  
municipal corporation; Loretta Neal,  
Former Income Tax Director of the  
City of Detroit; Mark Vann, Former  
Assistant Income Tax Director of the  
City of Detroit; James Florkowski,  
Manager I of the City of Detroit;  
Bryant Jenkins, Principal Accountant  
of the City of Detroit; and T.W.  
Graphics, Defendants-Appellees.**

No. 03-1884.

Argued: Nov. 30, 2004.

Decided and Filed: Jan. 14, 2005.

**Background:** Taxpayer sued city, alleging that its personal income tax collection practices violated federal Privacy Act. The United States District Court for the Eastern District of Michigan, Anna Diggs Taylor, J., 267 F.Supp.2d 718, dismissed. Taxpayer appealed.

**Holding:** The Court of Appeals, Norris, Circuit Judge, held that city could not be liable under Privacy Act provision, requiring government agency requesting an individual's social security number to inform the individual whether the disclosure of the social security number was mandatory or voluntary, and for what purpose agency intended to use the number.

Affirmed in part, reversed in part, and remanded.

Appeal from the United States District Court for the Eastern

## APPENDIX A

District of Michigan at Detroit. No. 02-74719--Anna Diggs Taylor, District Judge.

John C. Signorino, Weiner & Cox, P.L.C., Southfield, Michigan, for Appellant.

Linda D. Fegins, City of Detroit Law Department, Detroit, Michigan, for Appellees.

Elizabeth C. Thomson, Weiner & Cox, P.L.C., Southfield, Michigan, for Appellant.

Before: NORRIS and COOK, Circuit Judges; BECKWITH, Chief District Judge. [FN\*]

### OPINION

NORRIS, Circuit J.

Plaintiff Daniel Schmitt received a mailing from the City of Detroit concerning his 2001 income tax obligation. The vendor hired by the City to print these mailings included the recipient's social security number on the envelope. Plaintiff filed suit against the City under § 7(b) of Privacy Act of 1974 ("the Privacy Act"), Pub.L. 93-579, 88 Stat. 1896, on behalf of himself and other similarly situated individuals. [FN1] After the City agreed to include disclosure notices in future requests for social security numbers, the district court granted declaratory relief under the Privacy Act and dismissed all remaining claims pursuant to Fed.R.Civ.P. 12(b)(6). On appeal, plaintiff contends that he is entitled to money damages, attorney's fees, and costs. Because we hold that the Privacy Act applies solely to federal agencies, plaintiff failed to state a federal claim and, as a consequence, his complaint should have been dismissed *in toto*.

As do the federal government and the State of Michigan, the

## APPENDIX A

City relies on a person's social security number for tax identification purposes, as permitted by the Internal Revenue Code, 26 U.S.C. § 6109(d) ("The social security account number issued to an individual for purposes of section 205(c)(2)(A) of the Social Security Act shall, except as shall otherwise be specified under regulations of the Secretary, be used as the identifying number for such individual for purposes of this title."). In 2001, the City contracted with T.W. Graphics to print, address, pre-sort, and deliver income tax forms for mailing. The mailing label included the taxpayer's social security number. When this mistake came to light, Mayor Kwame Kilpatrick wrote a letter of apology to the aggrieved taxpayers, promising to "take the necessary steps to prevent such an unwelcome event in the future."

Plaintiff's initial complaint was filed on November 26, 2002, ten months after the mayor's apology. The complaint was amended the following January. Section 7(b) of the Privacy Act, which is the claim at the heart of this appeal, provides as follows:

Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

Pub.L. 93-579, 88 Stat.1909, 5 U.S.C. § 552a (2004) (note).

Throughout this litigation, plaintiff has relied upon this provision for the proposition that local governmental entities, such as the income tax division of the City, are subject to the Privacy Act. However, the language of § 7(b) suggesting that state and local agencies fall within its ambit is at odds with another crucial definition of the Privacy Act,

## APPENDIX A

as codified at 5 U.S.C. § 552a. Specifically, the Privacy Act defines the term "agency" with reference to the Freedom of Information Act ("FOIA"). See 5 U.S.C. § 552a(a)(1) (referencing FOIA definition of agency found at 5 U.S.C. § 552(e), subsequently re-designated at § 552(f)). Section 552(f) provides "'agency' as defined in section 551(1) of this title includes an executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency ...." 5 U.S.C. § 552(f)(1). Section 551(1) of Title 5, in turn, defines "agency" as "each authority of the Government of the United States ...." In short, the Privacy Act, albeit by reference, unambiguously defines the term "agency" as an agency of the federal government.

The district court looked to these statutory definitions and held that "[t]he City is not an agency under any statutory definition" and therefore is "not properly subject to the requirements of § 7(b) of the Privacy Act." *Schmitt v. City of Detroit*, 267 F.Supp.2d 718, 722 (E.D.Mich.2003). Other courts have likewise concluded that the Act applies only to federal agencies. *See Polchowski v. Gorris*, 714 F.2d 749, 752 (7th Cir.1983) ("the bill, as originally introduced, contained a remedy for improper disclosures by state authorities; these provisions were deleted, however, because of the uncertain effect of such a provision and because Congress felt that it lacked the necessary information for devising a remedial scheme in this context") (citing 1974 U.S.Code Cong. & Adm. News at 6933-34) (footnote omitted); *Stoianoff v. Comm'r of Motor Vehicles*, 107 F.Supp.2d 439, 442 (S.D.N.Y.2000) (observing that § 7(b) was "never codified"); *see also* J.M. Zittler, Annotation, *What is Agency Subject to Privacy Act Provisions*, 150 A.L.R. Fed. 521, 530 (1998) ( "The statutory definition of 'agency' would appear to be referring to federal agencies only") (collecting

## APPENDIX A

cases); but see *Greater Cleveland Welfare Rights Org. v. Bauer*, 462 F.Supp. 1313, 1319-20 (N.D.Ohio 1978) (inferring a right of action for prospective relief under § 7(b) against a county welfare department).

Despite the importance of this issue to the resolution of the appeal, in their briefs to this court, neither party focused upon the interplay between § 7(b) of Pub.L. 93-579 and the codified definition of agency found at 5 U.S.C. § 552a(a)(1). Rather, plaintiff simply assumed that § 7(b) controls while the City focused on the codified statute rather than upon the public law. That being the case, we start with basic principles. First, it is the Statutes at Large that "shall be legal evidence of laws." 1 U.S.C. § 112. By contrast, the United States Code shall "establish prima facie the laws of the United States." 1 U.S.C. § 204(a). Thus, even if a portion of Pub.L. 96- 579, which appears in the Statutes at Large at 80 Stat. 1896, were omitted from the United States Code, it would retain the force of law. *United States Nat. Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 448, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993); see generally Abner J. Mikva & Eric Lane, *Legislative Process*, 89-92 (Aspen Law & Business 2d ed.2002). However, that general principle gives way when a title of the United States Code has been enacted into positive law by Congress; when that happens, "the text thereof shall be legal evidence of the laws therein contained." 1 U.S.C. § 204(a); *National Bank of Oregon*, 508 U.S. at 448 n. 3. Congress enacted Title 5 as positive law in 1966. Pub.L. 89-554, 80 Stat. 378.

Given that Title 5 has the force of positive law, the viability of § 7(b) is premised upon whether it was codified. It was, albeit as a note to 5 U.S.C. § 552a. See 5 U.S.C. § 552a (Congressional Findings and Statement of Purpose). We are therefore confronted by two provisions of the Privacy Act that contradict one another to some degree: the statutory definition, which unambiguously contemplates that the

## APPENDIX A

Privacy Act applies exclusively to federal agencies, and § 7(b), which by its terms includes state and local agencies within its ambit.

When faced with statutory sections that are inherently inconsistent, our first duty is to reconcile the competing provisions so that they can both remain in effect. See *Daniel v. Cantrell*, 375 F.3d 377, 383 (6th Cir.2004); petition for cert. filed (U.S. Oct. 4, 2004) (No. 04-6822); *Anderson v. Yungkau*, 153 F.2d 685, 688 (6th Cir.1946) (dissent); see generally Singer, Norman, J. *Statutes and Statutory Construction* § 28:12 (West Group 6th ed.2002). In this case, however, such a reconciliation is impossible. The statutory definition of an agency found at § 552a(a)(1) contains no language to indicate that it does not apply to the Privacy Act as a whole. Were we to hold that § 7(b) applies to state and local agencies, we would effectively say that an unambiguous definition of a core term, which itself was promulgated by Congress, Pub.L. 93-579 § 3, 88 Stat. 1897, applies only part of the time. This we will not do.

While we are hesitant to rely upon legislative history, [FN2] in this instance it overwhelmingly supports the view that the Privacy Act applies exclusively to federal agencies. Not only was § 7(b) of Pub.L. 93-579 included in the notes to 5 U.S.C. § 552a, so too was § 2, the "Congressional Findings and Statement of Purpose," which contains the following finding: "[T]he privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by *Federal* agencies." Pub.L. 93-579, § 2(a)(1), 88 Stat. 1896 (emphasis added). In the same vein, Congress stated, "The purpose of this Act ... is to provide certain safeguards for an individual against an invasion of personal privacy by requiring *Federal* agencies ... to [*inter alia*] ... be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." Pub.L. 93-579 § 2(b)

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(emphasis added). Furthermore, Senate Report 93-1183, which is dated September 26, 1974, contains the following discussion of the Privacy Act's application to entities beyond the federal government:

### COVERAGE: PRIVATE, STATE AND LOCAL

As reported, the bill applies to Federal personal information systems, whether automated or manual, and to those of State, local and private organizations which are specifically created or substantially altered through grant, contract or agreement with Federal agencies, where the agency causes provisions of the act to be applied to such systems or files or relevant portions.

As introduced, S. 3418 applied to all governmental and private organizations which maintained a personal information system, under supervision of a strong regulatory body, with provision for delegating power to State instrumentalities.

The Committee has cut back on the bill's original coverage and ordered the Privacy Commission to make a study of State, local and private data banks and recommend precise application of the Act where needed.

1974 U.S.C.C.A.N. 6916, \*6932 -6933. At least one court has cited Senate Report 93-1183 in holding that the Privacy Act applies only to federal agencies. *Polchowski*, 714 F.2d at 752. If nothing else, the report indicates that Congress considered a broader application of the statute but held off pending further study. Finally, plaintiff cites us to nothing in the legislative history of the statute that would indicate that Congress viewed the dissemination of social security

## APPENDIX A

numbers differently than it did other records. See 1974 U.S.C.C.A.N. 6916, 6943-46 (discussing privacy concerns related to use of social security numbers but recognizing legitimate uses by entities other than the federal government and recommending further study by the Privacy Commission).

The fact that the Privacy Act contains a section that defines the term "agency" as including only those agencies that fall under [the] control [of] the federal government, coupled with a legislative history that supports such a reading of its scope, forces us to conclude that—notwithstanding the codification of § 7(b)—the Privacy Act applies exclusively to federal agencies. Because plaintiff cannot state a cause of action against the City, we hold that his suit was properly dismissed pursuant to Fed. R. Proc. 12(b)(6). To the extent that the district court granted declaratory relief under the Privacy Act, that portion of the court's order is reversed. The City may, for policy reasons, continue to include disclosure notices when requesting social security numbers, but it is not required to do so under the Privacy Act.

The judgment of the district court memorialized by its Order Granting Declaratory Relief is reversed to the extent that it grants declaratory relief under the Privacy Act and affirmed in all other respects. The cause is remanded to the district court with instructions to dismiss the complaint for failure to state a claim.

FN\* The Honorable Sandra S. Beckwith, Chief United States District Judge for the Southern District of Ohio, sitting by designation.

FN1. Plaintiff also sued former City income tax division employees, Loretta Neal and Mark Vann; Bryant Jenkins, the City's principal accountant; James Florkowski, a City

## **APPENDIX A**

manager; and T.W. Graphics, the vendor who produced the offending mailings. The amended class action complaint included state law negligence, emotional distress and invasion of privacy claims. The district court declined to exercise supplemental jurisdiction over plaintiff's state law claims and dismissed them without prejudice. They are not before us on appeal.

FN2. As Justice Jackson famously put it, "Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared ." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (concurrence). Justice Scalia has taken this skepticism about legislative history one step further, "The[ ] only mistake was failing to recognize how unreliable Committee Reports are—not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 617, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) (concurrence).

C.A.6 (Mich.),2005.  
*Schmitt v. City of Detroit*

2005 WL 77159 (6th Cir.(Mich.)), 2005 Fed.App. 0023P

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## **APPENDIX B**

No. 03-1884

### **UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**FILED**

DANIEL A. SCHMITT,

AUG 10 2005

LEONARD GREEN, Clerk

Plaintiff-Appellant,

) ORDER

v.

)

)

THE CITY OF DETROIT, A Michigan Municipal Corporation, ET AL. )

Defendants-Appellees

)

**BEFORE:** NORRIS and COOK, Circuit Judges,  
and BECKWITH\*, District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s/ Leonard Green

Leonard Green, Clerk

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\*Hon. Sandra S. Beckwith, Chief United States District Judge for the Southern District of Ohio, sitting by designation.